

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ROBERTO ANTONIO CACERES,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

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) Cr. No. 12-0202GT
) Cv. No. 12-2835GT

) **ORDER**
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On November 26, 2012, Petitioner, Roberto Antonio Caceres (“Mr. Caceres”), filed a Motion to Modify Sentence, presumably pursuant to 28 U.S.C. § 2255. Mr. Caceres requests a two level downward departure based on his status as a deportable alien, which Mr. Caceres asserts “should have been considered as a mitigating factor” at his sentencing. The Court has fully considered this matter, including a review of Mr. Caceres’s brief filed, the authorities cited therein and the arguments presented. For the reasons stated below, Mr. Caceres’s Motion to Modify Sentence is **DENIED**.

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1 First, Mr. Caceres pled guilty, pursuant to a written plea agreement, to one count of Deported
 2 Alien Found in the United States, in violation of 8 U.S.C. § 1326(a) and (b). In the written plea
 3 agreement, Mr. Caceres explicitly waived his right to appeal and/or collaterally attack his
 4 conviction or sentence. The Ninth Circuit has long acknowledged that the terms of a plea
 5 agreement are enforceable. *See, United States v. Baramdyka*, 95 F.3d 840, 843 (9th Cir. 1996),
 6 *cert. denied*, 117 S.Ct. 1282 (1997). Since Mr. Caceres expressly waived his statutory right to
 7 appeal or collaterally attack his sentence in his plea agreement, Mr. Caceres is now precluded from
 8 challenging that sentence pursuant to 28 U.S.C. § 2255. *See, United States v. Abarca*, 985 F.2d
 9 1012, 1014 (9th Cir. 1993) (holding that a knowing and voluntary waiver of a statutory right is
 10 enforceable).

11 Moreover, even if Mr. Caceres had not expressly waived his right to appeal or collaterally
 12 attack his sentence, his petition would still fail. In essence, Mr. Caceres argues that because of
 13 his status as a deportable alien, he is "ineligible[] for pre-release custody and minimum security
 14 confinement." Mr. Caceres argues that the Court should grant him a two level downward
 15 departure because of his status. However, Mr. Caceres's argument that the Court should depart
 16 downward because he is a deportable alien is precluded by statute and current Ninth Circuit
 17 case law. By statute, the Court may depart downward only if there are "aggravating or
 18 mitigating circumstances . . . not adequately taken into consideration by the Sentencing
 19 Commission." 18 U.S.C. § 3553(b). Specifically, the Ninth Circuit has held that the threat of
 20 deportation is not a factor that the district court may consider for sentencing purposes. *United*
 21 *States v. Alvarez-Cardenas*, 902 F.2d 734, 737 (9th Cir. 1990).¹ Accordingly,

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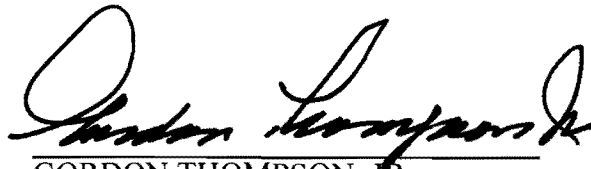
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 26 ¹ The Ninth Circuit decided, in an unpublished opinion, that the defendant, like Limon, was not
 27 entitled to a six month reduction in his sentence under 18 U.S.C. § 3553(b) because as a
 28 deportable alien he is not eligible to spend the last six months of his sentence in a half way
 house pursuant to 18 U.S.C. § 3624(c). *See United States v. Zepeda-Valles*, 87 F.3d 1325 (9th
 Cir. 1996).

1 **IT IS ORDERED** that Mr. Caceres's Motion to Modify Sentence is **DENIED**.

2 **IT IS SO ORDERED.**

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4
5 1-9-15
6 date

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8 GORDON THOMPSON, JR.
9 United States District Judge

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cc: AUSA Bruce Castetter

Petitioner